

November 19, 2008

Congressional Committees

Subject: *Mandate on the Department of Defense's Contract Award Procedures for Directed Spending Items*

Section 830 of the National Defense Authorization Act for Fiscal Year 2008¹ directed GAO to compare procedures used for awarding noncompetitive defense contracts for new projects pursuant to (1) congressionally directed spending items or congressional earmarks and (2) the special interests of senior executive branch officials. Specifically, it states:

“Not later than one year after the date of the enactment of the Act, the Comptroller General of the United States shall submit to the congressional defense committees a report on the use of procedures other than competitive procedures in the award of contracts by the Department of Defense. The report shall compare the procedures used by the Department of Defense for the award of funds for new projects pursuant to congressionally directed spending items, as defined in rule XLIV of the Standing Rules of the Senate, or congressional earmarks, as defined in rule XXI of the Rules of the House of Representatives, with the procedures used by the Department of Defense for the award of funds for new projects of special interest to senior executive branch officials.”

To address the mandate, we obtained documentation and interviewed officials from the Congressional Research Service (CRS), the Office of Management and Budget (OMB), the Office of the Secretary of Defense (OSD), each of the military services, the Joint Chiefs of Staff, one combatant command, several subcommands, and other Department of Defense (DOD) agencies. We reviewed appropriation bills and related conference reports for fiscal years 2005 and 2008 and certain clauses of rule XLIV of the Standing Rules of the Senate and rule XXI of the Rules of the House of Representatives that pertain to directed spending items and earmarks, respectively. We focused on these fiscal years because 2008 data are the most current data and because 2005 data were subject to the most extensive collection and analysis of directed spending items and earmarks by OMB and DOD. We also contacted officials and analyzed information from groups such as Taxpayers for Common Sense (TCS)

¹Pub. L. No. 110-181.

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and Citizens Against Government Waste. In addition, we met with former government employees with work experience in the legislative branch and at OMB and obtained their perspectives and viewpoints on special interest items. We also reviewed and compared the contents of databases maintained by OMB, DOD, and TCS that included information on directed spending items and earmarks. In addition, we explored various approaches for defining the term or phrase “projects of special interest to senior executive branch officials” and identifying such projects. Finally, we judgmentally selected 29 fiscal year 2005 congressionally directed spending items and reviewed the procedures DOD used to award contracts; the sample of contracts included some awarded by each of the military services. Our work was conducted from February through October 2008 in accordance with GAO’s quality standards and generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

As communicated with your staff in July and August 2008, despite our diligent efforts in exploring various approaches, we have concluded that it is not feasible for us to address the mandate as written. First, we have not found a methodologically sound approach for systematically identifying “new projects of special interest to senior executive branch officials.” Second, we were unable to apply the definitions of “congressionally directed spending items” and “congressional earmarks” recently incorporated in Senate and House Rules, respectively, because of data availability and timing issues. Finally, with these underlying constraints, the comparison of procedures called for in the mandate was not possible.² The following sections summarize the approaches we explored and the reasons they were not feasible.

Unable to Systematically Identify Executive Branch New Special Interest Projects

Several factors precluded us from performing the analysis on the executive branch side specified in the mandate. First, we found no commonly accepted definition of the term “new projects of special interest to senior executive branch officials” thereby making it difficult to identify an acceptable list of such projects.³ Second, since senior government officials, in general, have some level of management discretion in performing their missions, it is inherently difficult to attempt to distinguish decisions related to “new projects of special interest” from decisions they make exercising their general discretion as senior managers. Further, we found that little evidence or documentation exists linking project level decisions back to a particular senior government official.

²In a prior report, GAO describes selected federal agencies’ procedures for responding to congressional directives. With respect to DOD, the report describes the extent to which the department identified, categorized, tracked, executed, and reported on funds related to congressional directives. See GAO, *Congressional Directives: Selected Agencies’ Processes for Responding to Funding Instructions* GAO-08-209 (Washington, D.C.: Jan. 31, 2008).

³The statute did not define the term “senior executive branch official.” For purposes of this discussion, we are using the term “senior government official” in a general sense.

We explored numerous approaches for identifying and collecting data to determine if we could identify new projects of special interest to senior government officials. As summarized below, we determined that each of these approaches faced significant shortcomings with respect to definitions, data availability, or methodology, or a combination thereof, that rendered them infeasible.

- Reviewing the President's budget and the DOD budget process: We reviewed the President's budget and aspects of DOD's internal budget process and discussed with DOD officials possible revisions made at the request of senior government officials before the budget is submitted to Congress. For example, we identified military construction projects in the President's budget that specify an entity or location. However, DOD officials told us that these projects are vetted through the budgetary process. According to DOD officials, changes made during budget formulation by senior officials do not necessarily correlate to new projects of special interest and must meet the agency's overall policy goals. Changes made by federal agencies may or may not reflect new projects of special interest. It is not possible to determine which category a decision falls into without affirmation of the decision maker. Without this affirmation, we cannot determine if a budget revision reflects an adjustment in high-level policy priorities or reflects the effort of an individual to direct funding at a project level.
- Reviewing DOD reprogramming actions: We reviewed DOD's reprogramming process and selected reprogramming actions⁴ made during the year of execution to determine the extent to which these actions occur and how the actions are approved. As part of this effort, we reviewed new starts⁵ included in DOD's reprogramming reports for fiscal years 2005 to 2007. We found no evidence to link any of these types of reprogramming actions back to a project of interest to senior government officials.
- Discretionary spending by high level officials: We held discussions with high-level DOD offices and commands to identify instances where budget execution changes might be made at the discretion of a senior government official. We found that sufficient data are not available to identify and track minor changes. More significant changes to budget execution, those above a specified dollar threshold, generally result in reprogramming actions that require reporting to the congressional defense committees. Further, officials representing high-level DOD offices and commands told us that they do not award any discretionary funds but instead send the funds out to the service level for contract award to support mission requirements. Our prior work examined one combatant command with both command and acquisition authority—the United States Special Operations Command (SOCOM)—the

⁴Reprogramming enables DOD to shift funds within an appropriation or fund account to use them for different purposes than those contemplated at the time of appropriation by Congress. It is generally preceded by consultation between DOD and the appropriate congressional committees and sometimes requires formal notification.

⁵A new start is the initiation of an effort not previously justified to and funded by Congress during the normal budget process.

only command with a “checkbook.”⁶ SOCOM funded 86 acquisition programs from 2001 to 2006 to meet its specific battlefield needs. SOCOM assesses proposed programs through a screening process that weighs the relative costs, benefits, and risks of each and selects those that help SOCOM balance near- and future-term opportunities, and other needs. Our prior work found that the 86 acquisition programs were consistent with SOCOM’s mission.

- Reviewing government and private sector databases: We reviewed three earmark databases maintained by OMB, DOD, and TCS to see if the databases identified items as projects of special interest to a senior government official or officials and were funded through allocated appropriations controlled by or under the discretion of those officials. We found that these databases did not identify items as new projects of special interest to senior government officials.
- Identifying decisions directing contracts to specific beneficiaries or contractors during the contract award process: We met with officials from several high-level DOD organizations, such as the Office of the Under Secretary of Defense for Acquisition, Technology and Logistics, to discuss and obtain information on sole-source contracts that could link project level decisions to senior government officials or to specific contractors. These DOD officials told us that they do not have contracting authority or capability and, therefore, do not execute the award of contracts; instead, the contract award process is delegated to and carried out by military service level or other DOD support organizations.⁷ When we reviewed a sample of sole-source contracts awarded by these organizations, we found the use of justifications for awarding contracts noncompetitively that are specifically required by the Federal Acquisition Regulation (FAR),⁸ but did not find linkages of the awards to particular senior government officials. We further attempted to focus on cases discussed in the news media of alleged steering of contracts by senior DOD officials, but this approach did not allow the development of sufficient data sets required to perform an objective and methodologically sound analysis.

⁶GAO, *Defense Acquisitions: An Analysis of the Special Operations Command’s Management of Weapon System Programs*, GAO-07-620 (Washington, D.C.: June 28, 2007).

⁷Examples of support organizations are the Army Contracting Center of Excellence and the Washington Headquarters Service that carry out contracting actions for DOD offices, including those located in the Pentagon.

⁸FAR 6.302 identifies seven statutory authorities for other than full and open competition: (1) only one responsible source and no other supplies or services will satisfy agency requirements; (2) unusual and compelling urgency; (3) industrial mobilization, engineering, developmental, or research capability; or expert services; (4) international agreement; (5) authorized or required by statute; (6) national security; and (7) public interest.

House and Senate Rules

The Senate and House rules are designed to make the government funding process more transparent by more clearly identifying congressionally directed spending items and congressional earmarks, respectively. In prior reports, the CRS, the DOD Inspector General, and we have noted that there are no single commonly accepted definitions of such terms as “congressionally directed spending item” and “earmark” and we believe that any attempt to define the terms is subject to interpretation and challenge. The terms have been defined and used in various ways, including the following:

- GAO’s Glossary of Terms Used in the Federal Budget Process defines earmarking as dedicating collections by law for a specific purpose or program or designating any portion of a lump-sum amount for particular purposes by means of legislative language.⁹
- OMB defines earmarking as funds provided by the Congress for projects or programs where congressional direction (in bill or report language) “circumvents” the merit-based or competitive allocation process or specifies the location or recipient, or otherwise curtails the ability of the executive branch to control critical aspects of the funds allocation process. On January 29, 2008, the President issued Executive Order 13457¹⁰ directing executive agencies not to commit, obligate, or expend funds on the basis of earmarks included in any non-statutory source, including requests in reports of congressional committees or other congressional documents or communications from or on behalf of members of Congress, except when required by law or when an agency has itself determined a project, program, activity, grant, or other transaction to have merit under statutory criteria or other merit-based decision making. The executive order applies to appropriations laws and other legislation enacted after the date of the order. On October 23, 2008, OMB issued a memorandum providing guidance on implementing the Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009 in accordance with Executive order 13457 on “Protecting American Taxpayers from Government Spending on Wasteful Earmarks.” The memo specifies, in implementing the Act, agencies are legally obligated to fund an earmark only if it was in the statutory text of the fiscal year 2008 appropriation (including earmarks that were statutorily incorporated by reference), was of a continuing nature (rather than of a one-time, non-recurring nature), and could not be carried out by funding the

⁹GAO, *A Glossary of Terms Used in the Federal Budget Process*, [GAO-05-734SP](#) (Washington, D.C.: September 2005). GAO’s glossary fulfills part of GAO’s responsibility under 31 U.S.C. § 1112(c)(1) to publish standard terms, and classifications for the government’s fiscal, budget, and program information. The glossary must be developed in cooperation with the Secretary of the Treasury, OMB, and the Congressional Budget Office.

¹⁰E.O. 13457, 73 Fed. Reg. 6417 (Feb. 1, 2008).

earmark in the remainder of fiscal year 2009 if Congress ultimately decides to provide continued funding in fiscal year 2009 for that earmark.¹¹

- According to DOD officials, the department defines directed spending, which they refer to as “add-ons,” as an increase in funding levels in the bill language included in the appropriations conference report that was not originally requested in the President’s budget submission.
- CRS defines earmarks as “funds set aside for a specific purpose, use or recipient.”¹²

In 2007, both the House and Senate adopted rules to bring greater transparency to congressional earmarks and directed spending items. The House rules defined the term “congressional earmark” as a provision or report language included primarily at the request of a Member, Delegate, Resident Commissioner, or Senator providing, authorizing, or recommending a specific amount of discretionary budget authority, credit authority, or other spending authority for a contract, loan, loan guarantee, grant, loan authority, or other expenditure with or to an entity, or targeted to a specific state, locality, or congressional district, other than through a statutory or administrative formula-driven or competitive award process.¹³ The rules were added to explicitly describe what should be declared as congressionally directed spending items and congressional earmarks, and established public disclosure requirements. Both the House and Senate rules require public disclosure of a list of congressional earmarks and congressionally directed spending items. The House and Senate Appropriations Committees compiled a list of these items for the first time in fiscal year 2008.

We were unable to apply the definitions of congressional earmarks and congressionally directed spending items specified in House and Senate Rules, respectively, in this review because of data availability and timing issues:

- For years prior to when the rules went into effect, data associated with the disclosure requirements are not available to permit us to apply the definition to items in particular committee report provisions. Specifically, we cannot confirm that (1) the provision was included primarily at the request of a

¹¹OMB Memorandum M-09-03, Guidance on implementing P.L. No. 110-329 in accordance with Executive Order 13457 on “Protecting American Taxpayers From Government Spending on Wasteful Earmarks” (Oct. 23, 2008).

¹²In prior work, CRS pointed out that the treatment of earmarks reflects procedures established over time that may differ from one appropriation bill to another. For some bills, a directed spending item may refer to funds set aside within an account. In other bills, the application may reflect a narrower set of directives to fund individual projects, locations, or institutions. See CRS, *Earmarks and Limitations in Appropriation Bills*, Report 98-518 Gov (updated Dec. 7, 2004); and *Bush Administration Policy Regarding Congressionally Originated Earmarks: An Overview*, Report RL34648 (Sept. 4, 2008).

¹³The Senate rule’s definition for “congressionally directed spending item” is the same as the House rule’s definition for “congressional earmark,” except the Senate rule does not include a “Member, Delegate, or Resident Commissioner” as a requester as in the House rule, but instead includes only “Senator” as a requester.

Senator or Member, Delegate, or Resident Commissioner; (2) whether the spending item in the provision was targeted to a specific state, locality, entity, or congressional district by its sponsor; and (3) if it was so targeted, whether it involved a statutory or administrative formula-driven or competitive award process.

- For fiscal year 2008, the most current year, we could not complete an analysis of directed spending items and earmarks because of limited time available for DOD to either obligate the funding or award a contract. Funds are available for obligation for 1 to 5 years depending on the type of funds involved. For example, procurement funds are available for obligation for 3 years, which means that fiscal year 2008 funds might not be obligated until sometime in fiscal year 2010. As a result, we believe it would not yet be possible to develop a comprehensive perspective of the competitive or noncompetitive award status of the congressionally directed spending items or congressional earmarks for fiscal year 2008.

Unable to Compare Directed Spending Items in the Legislative and Executive Branches

Various federal agencies and nongovernmental organizations have devoted considerable resources to identifying and monitoring trends in congressionally directed spending items or congressional earmarks and both the House and the Senate have recently taken actions to bring greater transparency to this area. Little information about directed spending by executive level officials is available making transparency difficult. DOD officials indicated that executive directed spending does not exist because items in the budget are vetted in the normal process of developing the budget proposal. OMB representatives told us that they look at the defense budget from an overall policy level rather than at the budget line item level. Our work on this mandate, as discussed throughout this letter, has shown that little information is available to identify directed spending by senior executive branch officials, should it occur.

Agency Comments and Our Evaluation

DOD and OMB representatives provided oral comments on a draft of this letter. Both stated that they agreed with our facts and observations. DOD and OMB also provided technical comments, which we incorporated as appropriate.

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We are sending copies of this report to the Secretary of Defense and the Director of the Office of Management and Budget. In addition, the correspondence will be available at no charge on the GAO Web site at <http://www.gao.gov>.

If you have any questions or need additional information, please contact me at (202) 512-7252 or sherrilla@gao.gov. Key contributors to this report were James Fuquay, Assistant Director; Matt Drerup; Michael Hesse; Wendell Hudson; Ken Patton; Sylvia Schatz; Wendy Smythe; and Robert Swierczek.

A handwritten signature in black ink that reads "Andrew Sherrill". The script is cursive and fluid, with the first name "Andrew" and last name "Sherrill" clearly distinguishable.

Andrew Sherrill
Acting Director, Acquisition and Sourcing Management

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